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IN THE

Supreme Court of the United States

OCTOBER TERM 1955

No. 337

THOMAS W. BANKS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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The petitioner, Thomas W. Banks, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above entitled case on June 28, 1955.

OPINIONS BELOW

The opinion of the Court of Appeals originally affirming the judgment of conviction entered by the District Court herein is reported at 204 F 2d 666. The petitioner's petition

for writ of certiorari with respect thereto was granted by this Court at 348 U. S. 905. At the same time, this Court ordered the judgment herein vacated and the case remanded to the Court of Appeals for consideration in the light of *Holland v. United States*, 348 U. S. 121, *Friedberg v. United States*, 348 U. S. 142, *Smith v. United States*, 348 U. S. 147, and *United States v. Calderon*, 348 U. S. 160. On this remand, the Court of Appeals reaffirmed the judgment of conviction. Its decision is not yet officially reported but is set forth in the attached Appendix as is the Court of Appeals' order denying both the petitioner's petition for rehearing as well as his request that the rehearing petition be considered by the Court en banc.

JURISDICTION

The judgment of the Court of Appeals was dated and entered on June 28, 1955. A petition for rehearing was timely filed on July 18, 1955, and was denied by the Court's order, without opinion, dated and entered on July 25, 1955.

The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED FOR REVIEW

(1) Did the court below err in refusing to reverse the judgment of conviction herein and order petitioner's acquittal where the government's net worth exhibit wholly failed to include any cash on hand as an asset of petitioner as of the opening date notwithstanding evidence that petitioner had substantial dealings in cash in the course of his business activities?

(2) Did the court below err in refusing to reverse the judgment of conviction herein and order petitioner's acquittal where the government's case was founded on uncorroborated admissions of petitioner relating to his net worth as of July 1937, which the government selected as its starting date?

(3) Did the court below err in refusing to reverse the judgment of conviction herein and order petitioner's acquittal where there was no adequate legally admissible evidence produced before the grand jury which returned the indictment on which the petitioner was tried?

(4) Did the court below err in refusing to reverse the judgment of conviction and order a new trial herein for prejudicial error committed by the trial court in failing to give, even though requested, any instructions whatsoever to the jury on the nature of the net worth method, the assumptions on which it rests, and the inferences available to the petitioner thereunder?

(5) Did the court below err in refusing to reverse the judgment of conviction and order a new trial herein for prejudicial error committed by the trial court in instructing the jury that the necessary intent to commit the crime charged was to be presumed to exist if petitioner omitted income from his return and the government was thereby cheated or defrauded of the tax thereon?

(6) Did the court below err in refusing to reverse the judgment of conviction and order a new trial herein for prejudicial error committed by the trial court in (i) admitting into evidence the government's net worth and tax deficiency schedules and the gross enlargements thereof, (ii) permitting these exhibits to be taken to the jury room for use by the jury during its deliberations, and (iii) wholly

failing to give any guarding instructions with respect to the jury's use of such exhibits?

THE STATUTE INVOLVED

The statute under which petitioner was prosecuted reads as follows:

Sec. 145 (b) 26 U.S.C.:

> "Any person * * * who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution."

STATEMENT OF THE CASE

Petitioner was indicted, tried and convicted in the United States District Court for the District of Minnesota for willfully and knowingly attempting to evade his federal income taxes for the years 1945, 1946, and 1947 in violation of Sec. 145 (b) of the Internal Revenue Code, 26 U.S.C. The trial court had jurisdiction of the matter under Sec. 3231, 18 U.S.C. Petitioner was given a general sentence of three years imprisonment and a fine of $10,000 on the three counts involved in the indictment.

Before being arraigned and pleading to the indictment, petitioner filed a motion to dismiss the indictment on the ground, among others, that there was no sufficient legal evidence before the grand jury to sustain and warrant the return of the indictment. (R. 3-20)[1] This motion was renewed im-

[1]References are to the printed record in the Court of Appeals, copies of which were filed with this Court in connection with the prior petition for certiorari herein.

mediately prior to the commencement of the trial but was again denied by the trial court. (R. 44-58) From the uncontradicted affidavits filed in support of this motion it appears that the only witness before the grand jury was the government's Special Agent, George McKusick, and further that the grand jury considered the matter for not more than one hour from the time it received its instructions from the district court until it announced its readiness to return a partial report to the court which included the indictment against the petitioner.

The government's case against petitioner was based on the use of the net worth method. (R. 197) There was no evidence of any sort that the petitioner omitted any item of income or claimed any excessive deductions on his returns for the prosecution years.[2]

The government used December 31, 1936, as the starting point for its net worth schedules (Exs. 224-225). The assets and liabilities which the government agents imputed to the petitioner as of that date were arrived at by adjustments which they made to the amounts set forth in an affidavit submitted by petitioner in July 1937 in connection with

[2]Reflective of the attitude of the Court of Appeals on the rehearing ordered by this Court is the following statement in its decision reaffirming the judgment of conviction. (Appendix, infra, p. 26).

> "Properties were sold which were owned jointly by appellant and some other person. The other person reported his share of the proceeds of such sales but appellant did not include any part of his share in his tax returns."

How the court arrived at this statement is not clear for it is wholly without support in the record and is contrary to the theory of the prosecution both at the trial and on appeal. (See R. 389). Not only was there no evidence that the petitioner omitted any item of income from his returns but in addition there was no evidence as to how any so-called "other person" reported his income from ventures in which petitioner was alleged to be interested.

his efforts to compromise an alcohol tax deficiency previously assessed against him and others. (R. 340)

The revenue agent who prepared the government's net worth exhibits included no cash on hand as an asset of petitioner as of December 31, 1936, the government's opening net worth date (Ex. 224) even though the agent testified that petitioner was a man who dealt in substantial amounts of cash. (R. 433-434)

In purported summary of its case, the government introduced a series of exhibits (Exs. 224-227) which it claimed showed petitioner's correct net worth at the end of each of the prosecuting years and the years immediately prior thereto, his living expenses for these years, the amount of income which he allegedly failed to report in his returns for these years, and the tax deficiencies which the government contended existed for these years.

The revenue agent witness and counsel for the government admitted at the trial that these exhibits constituted the government agent's interpretations of the evidence introduced at the trial and his assumptions and conclusions with respect thereto. (R. 487, 544-545, 548) The revenue agent further admitted that these exhibits were in part based on audit reports prepared by other government agents which were not in the court room or introduced in evidence (R. 534) and further that certain evidence received at the trial was disregarded by the revenue agent in preparing these net worth exhibits because the agent considered such evidence to be unreliable or erroneous. (R. 541, 562)

At the conclusion of the evidence the defendant moved for a dismissal of the indictment on the ground that the government had failed to prove that defendant had violated Sec.

145 (b), 26 U.S.C., as charged. (R. 576, 579) The court denied this motion (R. 579)

In its charge to the jury, the trial court disregarded defendant's requested instruction No. 11 (R. 582) relating to the net worth method and failed to give any instructions whatsoever to the jury either as to the nature of the net worth method used by the government in the case, the assumption on which the net worth method rests, or the inferences available to the defendant in such a situation.

The trial court did, however, include in its instruction to the jury a charge to the effect that intent to commit the crime for which the petitioner was accused was to be presumed to exist if defendant omitted income from his return and the government was thereby cheated or defrauded of the tax thereon, viz.: (R. 616)

> "* * * The attempt [to evade and defeat the tax] must be willful, that is, intentionally done with the intent that the Government should be defrauded of the income tax due from the defendant.
>
> "The presumption is that a person intends the natural consequence of his acts and the natural presumption would be if a person consciously, knowingly, or intentionally did not set up his income and thereby the Government was cheated or defrauded of the tax, that he intended to evade and defeat the tax."

At the conclusion of the court's instructions, the jury retired to the jury room with all the exhibits in the case including exhibits 225 and 277 which are enlargements (9′ x 4′2″) of the government agent's net worth and tax deficiency schedules. (See R. 618.) No guarding instructions were given by the trial court with respect to the exhibits; instead the court instructed the jury as follows: (R. 618)

"You are instructed to determine whether the individual tax liabilities for the years here involved are correct as the same is set forth in the computations and charts made by the Government's expert witnesses in response to the hypothetical questions which assume the truth of the Government's evidence.

"It is not necessary that the Government prove an evasion of all the taxes charged in the indictment. It is sufficient if any substantial portion of a tax was attempted to be defeated and evaded as charged in that count."

REASONS FOR GRANTING THE WRIT

As to Question No. I

The decision of the court below in refusing to acquit the petitioner where the government's opening net worth statement allowed the defendant no cash on hand notwithstanding the fact that petitioner had substantial dealings in cash is contrary to the rule prescribed by this court in *Holland v. United States* (1955), 348 U. S. 121, and is in direct conflict with the decision of the Court of Appeals for the Second Circuit in *United States v. Frank Costello* (April 5, 1955), 221 F. 2d 668.

In *Holland v. United States,* this Court declared the rule to be as follows:

"• • • an essential condition in cases of this type is the establishment, with reasonable certainty, of an opening net worth, to serve as a starting point from which to calculate future increases in the taxpayer's assets."

• • • • •

"The importance of accuracy in this figure is immediately apparent, as the correctness of the result depends entirely upon the inclusion in this sum of all assets on hand at the outset."

Mindful of this pronouncement, the Court of Appeals for the Second Circuit in *United States v. Frank Costello,* supra, reversed the defendant's conviction as to the year 1947 for the reason that the government's net worth statement allowed the defendant no cash on hand as of the beginning of the prosecution period, notwithstanding the fact that the defendant was engaged in a gambling occupation. The government urged in support of its allowance of no opening cash that there was evidence that the defendant had borrowed money during this period and had permitted debts to be in default, all of which indicated that the defendant was without cash at the opening net worth date.

In casting aside this contention and in ordering defendant's acquittal for the year 1947, the Appellate Court stated:

> "Concededly the 'net worth' at the beginning of each year would be falsified to the extent that any such sum [of cash on hand] was omitted; and with it would fall the computations for later years."
>
> * * * * *
>
> "* * * a man in Costello's position, whose affairs, as we can see, varied greatly up and down, might have allowed interest to run up, confident that in the end a turn would come; and have kept on hand a substantial cash reserve, prepared for a run of bad luck that would demand immediate calls for large payments. His situation was far from ordinary; and, as we have said, in the past he had always kept such reserves in large amounts. Considering the admonition with which the Supreme Court has hedged about the 'net worth method,' we cannot therefore agree that the evidence, taken as a whole, justifies the inference that he had no reserve on January 1, 1946."

In the case at bar petitioner, like the defendant in the *Costello* case, was engaged in the gambling occupation. (See

Exs. 9-11) As such he was accustomed to carrying on a large part of his transactions in cash and the government agents so admitted at the trial. (R. 433-434) Yet, notwithstanding these facts, the agents' opening net worth calculations did not allow petitioner any cash on hand whatsoever.

The decision of the court below in affirming petitioner's conviction in the face of such circumstances when the rule announced by this court in *Holland v. United States*, supra, specifies a contrary result as the Second Circuit recognized in the *Costello* case, supra, suggests a review by this Court.

As to Question No. II

The decision of the court below in affirming petitioner's conviction on proof which was predicated on uncorroborated admissions of the defendant is contrary to the remand order of this Court (75 S. Ct. 311) requiring reconsideration of this case in accordance with the principles prescribed in *Holland v. United States*, 348 U. S. 121, *Friedberg v. United States*, 348 U. S. 142, *Smith v. United States*, 348 U. S. 147, and *United States v. Calderon*, 348 U. S. 160.

In the instant matter, the government used as the cornerstone of its net worth case against petitioner, the financial information set forth in an affidavit filed by petitioner in 1937 with the Collector of Internal Revenue for the purpose of bringing about a compromise settlement of an alcohol tax deficiency previously assessed against petitioner and others. The government agents who testified on behalf of the prosecution in this case admitted that they had not verified the financial information contained in this affidavit themselves but had instead relied upon the written reports of examinations made by other revenue agents at the time

the settlement offer was being considered by the government in 1937. These written revenue agent reports were not produced in the court room or introduced in evidence and the revenue agents who made these examinations were not called to testify at the trial. The conclusion is, therefore, inescapable that the financial data contained in this settlement affidavit of petitioner, which the prosecutor labelled as the cornerstone of the government's case against petitioner, was wholly uncorroborated.

With respect to this settlement affidavit, it is to be noted that it does not purport to be a net worth statement of petitioner but rather a listing of some of his assets. Thus, it includes no cash on hand, no amount due petitioner from third parties, and it does not purport to list all petitioner's securities or to give his cost basis in the securities which are itemized. Further the affidavit refers to petitioner's safe deposit box in a Minneapolis bank but it does not purport to list the contents thereof.

The lower court's affirmance of the prosecution's use of this affidavit as the government's net worth starting point ignores the rule requiring corroboration announced by this Court in *United States v. Calderon,* supra, and should be reviewed.

As to Question No. III

In this case the grand jury returned an indictment after hearing the testimony of a single witness for less than one hour. This witness was a government agent whose testimony in narrative form occupies 140 pages of the printed record and was composed almost entirely of expert accounting testimony with respect to entries in various books and records

introduced at the trial and to procedures used by the government in investigating the case against petitioner. The residual of this agent's testimony concerned details of the so-called admissions (Exhibits 33, 70, 71) obtained from petitioner. The substantive testimony on which the prosecution rested its case against petitioner was introduced through some forty other government witnesses and more than two hundred exhibits which these witnesses identified and laid foundation for.

With such a state of facts it is clear that the traditional constitutional safeguards, founded on the Fifth Amendment's provision that no person shall be held to answer for a capital or other infamous crime unless on a presentment or indictment of a grand jury, were denied petitioner in this case.

The rule is well established that a grand jury can properly find an indictment only on competent legal evidence such as would be legitimate and proper before a petit jury and it may not indict on current rumors, unverified reports, evidence of what third persons have said, or hearsay. *United States v. Rubin,* 218 Fed. 245 (D. Conn., 1914); *In re Grand Jury,* 62 Fed. 840, 846 (N.D. Cal., 1894); *United States v. Kilpatrick,* 16 Fed. 765, 771 (W.D. N.C., 1883); *United States v. Farrington,* 5 Fed. 343 (N.D. N.Y., 1881); *Charge to Grand Jury,* 2 Sawy. 667, 670, 30 Fed. Cas. 992, 993-994 (C.C., D. Cal., 1872; by Field, J.); 1 Chitty Crim. Law 318; see *Hale v. Henkel,* 201 U. S. 43, 65-66.

The courts have further held that the evidence necessary to sustain the indictment must be such as would warrant a conviction by a petit jury if unexplained and uncontradicted. See *Charge to Grand July,* Taney 615, 616-617; 30 Fed. Cas. 998, 999 (C.C., D. Md., 1836; by Taney, J.); 4 Bla, Comm. 303; 1 Chitty Crim. Law 318.

Here the government agent, McKusick, was clearly unqualified to give substantive testimony on any of the elements of the crime for which petitioner was indicted and the proof of which was essential to a valid conviction. In such a situation the "indictment" returned by a grand jury based solely on the government agent's summary testimony can have no validity under the Fifth Amendment.

The judgment below affirms petitioner's conviction on the basis of such an indictment and thus raises an important constitutional question which this Court should determine.

As to Question No. IV

The decision of the court below in affirming petitioner's conviction where the trial court wholly failed to give the jury any instructions whatsoever on the nature of the net worth method, the assumptions upon which it rests, or the inferences available to the defendant in such a case is directly opposed to the rule declared by this Court in *Holland v. United States,* 348 U. S. 121, and is in conflict with the decision of the Court of Appeals for the Fifth Circuit in *C. A. Dupree v. United States* (April 15, 1955), 222 F. 2d 748.

On the rehearing granted petitioner under the order entered by this Court on January 10, 1955 (348 U. S. 905), petitioner brought to the attention of the Court of Appeals the fact that, contrary to the rule of the *Holland* case, supra, the trial court had refused to grant petitioner's requested instruction number 11 and had completely omitted any instructions of any kind with respect to the net worth method.

In its decision reaffirming the judgment below, the Court of Appeals (appendix, infra, p. 29) while recognizing that the trial court had failed to instruct on the net worth method,

asserted that this was not prejudicial to petitioner since the government counsel and the government witnesses had described the nature and characteristics of the net worth method to the jury. This affirmance of the trial court's abdication to the prosecutor and his witnesses of the court's responsibilities cannot be permitted to stand since it represents a refusal by the Court of Appeals to follow the pronouncements of this Court in the *Holland* case where the traditional concepts of judicial solicitude in protecting the rights of the accused were reaffirmed.[3]

The fundamental issue concerning the administration of criminal justice raised by the lower court's ruling on this point requires this Court's review.

As to Question No. V

The Court of Appeals' affirmance of petitioner's conviction in light of the trial court's presumptive intent instruction (supra p. 7) is contrary to the decision of this Court in *Morisette v. United States* (1952) 342 U. S. 246, at 275, and is directly in conflict with the decision of the Court of Appeals for the Ninth Circuit in *Bloch v. United States* (1955) 221 F. 2d 786.

In the case at bar the trial court instructed the jury on the matter of intent as follows (R. 616-617):

> "The attempt [to evade and defeat the tax] must be willful, that is, intentionally done with the intent that the Government should be defrauded of the income tax due from the defendant.

[3]The responsibility of the trial court to clearly and adequately instruct the jury cannot be effectively discharged either by the arguments of counsel or the testimony of the prosecution witnesses. *Medley v. United States,* (C.A.D.C. 1946) 155 F. 2nd 857. See also *United States v. Nobles* (C.A. 3 1946) 155 F. 2d 315.

> "The presumption is that a person intends the natural consequence of his acts and the natural presumption would be if a person consciously, knowingly, or intentionally did not set up his income and thereby the Government was cheated or defrauded of the tax, that he intended to evade and defeat the tax."

Such an instruction is contrary to the decision of this Court in *Morisette v. United States* supra, where it is stated:

> "We think presumptive intent has no place in this case. A conclusive presumption which testimony could not overthrow would effectively eliminate intent as an ingredient of the offense. A presumption which would permit but not require the jury to assume intent from an isolated fact would prejudge a conclusion which the jury should reach of its own volition. A presumption which would permit the jury to make an assumption which all the evidence considered together does not logically establish would give to a proven fact an artificial and fictional effect. In either case this presumption would conflict with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime. Such incriminating presumptions are not to be improvised by the judiciary. Even congressional power to facilitate convictions by substituting presumptions for proof is not without limit."

In *Bloch v. United States,* supra, the trial court gave precisely the same instruction on presumptive intent as was given in the case at bar. On appeal the Court of Appeals, on its own motion and without error having been assigned by the defendant, reversed the judgment of conviction and ordered a new trial for the prejudicial error involved in this instruction. As authority for its conclusion the Court of

Appeals cited the rule of the *Morisette* case as set out above; viz.:

> "[What was said by the Supreme Court in the Morisette case] applies equally to the case at bar where under the above portion of the trial court's charge the jury was told in effect that they could draw the conclusion that the appellant had intended to defeat or evade the payment of his tax from the mere fact that he filed an incorrect income tax return."

The decision of the Court of Appeals in the case at bar which approved and confirmed the trial court's presumptive intent instruction is contrary to the rule of the *Morisette* case and in direct conflict with the decision in the *Bloch* case, and should be reviewed by this Court.

As to Question No. VI

The affirmance by the Court of Appeals of petitioner's conviction notwithstanding the fact that the trial court admitted into evidence the government agents' net worth and tax deficiency schedules and permitted these schedules to be taken to the jury room for use by the jury during its deliberation and failed to give any guarding instruction with respect thereto is squarely contrary to the decision of this Court in *Holland v. United States,* 348 U. S. 121 and is in direct conflict with the decision of the Court of Appeals for the Fifth Circuit in *Joe R. Steele v. United States,* (May 13, 1955) 222 F. 2d 628.

In this case the government agents prepared net worth statements and tax deficiency computations based on their own interpretations, appraisals and selections of evidence introduced at the trial. These exhibits were received, over

defendant's objections, into evidence as were billboard size replicas thereof (Exhibits 225 and 227). At the conclusion of the trial when the jury retired for deliberation these exhibits were taken with the jury for use in reaching their verdict.[4] The only instruction given by the court in connection with these exhibits was as follows (R. 618):

> "You are instructed to determine whether the individual tax liabilities for the years here involved are correct as the same is set forth in the computations and charts made by the government's expert witnesses in response to the hypothetical questions which assume the truth of the government's evidence.
>
> "It is not necessary that the government prove an evasion of all of the taxes charged in the indictment. It is sufficient if any substantial portion of the tax was attempted to be defeated and evaded as charged in that count."

[4] In its decision on rehearing, the Court of Appeals (Appendix infra p. 33) stated that nothing in the records here indicates what happened to Exhibits 33, 70 and 71 after the jury retired and that the decision of the Fifth Circuit in Joe R. Steele v. United States, supra, was therefore not applicable. However, the court was, in this regard, laboring under a misconception of the facts for the net worth and tax deficiency schedules in dispute were Exhibits 224-227, not Exhibits 33, 70 and 71. Furthermore, the jury was instructed to examine the computations contained in Exhibits 224-227 to see that they conformed with the jury's understanding of the evidence and this necessarily required that the exhibits be with the jury if they were to comply with the court's charge. Further proof, if such is necessary, that the well established procedure of the jury's taking with it all exhibits in a case for use during its deliberation was followed here is found at R. 571 where counsel on both sides and the court had an express understanding that Exhibits 228 and 229 (being the court commissioner's complaint and the warrant of arrest issued against petitioner herein) were not received as regular exhibits and were therefore not to be used by the jury in its deliberations.

The conflict of the decision of the court below with the decision of this Court in the *Holland* case is readily apparent in the light of the following excerpt from *Holland*:

> "There is great danger that the jury may assume that once the Government has established the figures in its net worth computations, the crime of tax evasion automatically follows. The possibility of this increases where the jury, WITHOUT GUARDING INSTRUCTIONS, is allowed to take into the jury room the various charts summarizing the computations; bare figures have a way of acquiring an existence of their own, independent of the evidence which gave rise to them."

This rule was applied in *Joe R. Steele v. United States*, supra, where the Court of Appeals reversed the defendant's conviction on the ground that prejudicial error occurred in the trial court's permitting the government's net worth exhibits (similar to Exhibits 224-227 in this case) to be received in evidence and taken to the jury room during deliberation.

The error in the proceedings below arising from the receipt of the government's interpretative exhibits into evidence and the use thereof by the jury during deliberation was magnified by the trial court's permitting wall size replicas thereof to be brought into evidence and kept before the jury throughout the trial and during its deliberation on the verdict. Not only was there the possibility, as this Court noted in the *Holland* case, that the jury might assume that once the government has established the figures in its net worth computations, the crime of tax evasion automatically follows, but in addition there was the equally prejudicial possibility that the jury would assume that the interpretations, appraisals and selections of evidence employed by the revenue agents

in preparing these exhibits was automatically to be accepted as correct.

Under such circumstances as these, where the Court of Appeals has failed to follow the fundamental principles reaffirmed by this Court in the *Holland* case, a review by this Court is indicated.

CONCLUSION

It is respectfully submitted that the issues raised in this petition concerned most fundamental and important matters in the administration of criminal justice and particularly in the field of income tax law violations. A writ of certiorari to the Court of Appeals for the Eighth Circuit to review the judgment herein is accordingly respectfully requested.

Respectfully submitted,

JOSEPH A. MAUN
JOHN W. GRAFF
Counsel for Petitioner

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 14,648

Thomas W. Banks,
Appellant,

vs.

United States of America,
Appellee.

Appeal from the United States District Court for the District of Minnesota.

[June 28, 1955]

Joseph A. Maun and John W. Graff for Appellant.

George E. MacKinnon, United States Attorney (Clifford Janes and Alex Dim, Assistant United States Attorneys, were with him on the brief), for Appellee.

Before GARDNER, Chief Judge, and WOODROUGH and THOMAS, Circuit Judges.

THOMAS, Circuit Judge.

Appellant, Thomas W. Banks, was indicted, tried and convicted in the District Court of Minnesota, for willfully and knowingly attempting to evade his income taxes for the years 1945, 1946 and 1947, in violation of § 145 (b) of the Internal Revenue Code, 26 U.S.C.A. Upon appeal to this court the judgment of conviction was affirmed on May 27, 1953. 8 Cir., 204 F. 2d 666. The Supreme Court denied a petition for certiorari, 346 U. S. 857. Thereafter the order denying certiorari was vacated and the case was restored to the docket of the Court. 347 U. S. 1007.

The charge of income tax evasion against appellant was proved by the government by the net worth method. On December 6, 1954, the Supreme Court decided four other net worth cases. *Holland v United States,* 348 U. S. 121; *Friedberg v. United States,* 348 U. S. 142; *Smith v. United States,* 348 U. S. 147, and *United States v. Calderon,* 348 U. S. 160.

On January 10, 1955, a petition for certiorari was granted; the judgment was vacated, and the case was remanded to this court "for consideration in the light of *Holland v. United States*", and the *Friedberg, Smith* and *Calderon* decisions of the Supreme Court.

On January 24, 1955, this court entered an order placing the case upon the calendar of the court for rehearing at the March, 1955, session and limiting the argument of counsel to the question of alleged errors of the trial court in its rulings with reference to the admissibility or sufficiency of the evidence admitted or rejected as proof of net income under the so-called net worth method and to any alleged error in the instructions of the court relating to such net worth method.

Elaborate printed briefs have been filed by the parties and the case has been argued orally. Basically counsel for appellant contend that the trial court erred in denying appellant's motion for a judgment of acquittal or for a new trial. In support of this general contention counsel argue that

1. The government's case was founded upon uncorroborated admissions of appellant;

2. The government failed to investigate leads available to it independently to verify the uncorroborated admissions of appellant; and

3. The court erred in failing to give certain requested instructions.

It will be noted that appellant did not testify in his own behalf at the trial and he offered no evidence to explain or deny the charge in the indictment or the evidence of the government.

The facts in the case and the contentions of appellant on the appeal are related and considered by this court in the opinion reported in 204 F. 2d 666, supra.

Appellant urges most emphatically that the government's case was founded upon his own uncorroborated admissions. The rule requiring corroboration of admissions and confessions in criminal cases, and particularly in "net worth" cases is stated and discussed at length by the Supreme Court in *Smith v. United States*, 348 U. S. 147, 156, in which it is said:

"There has been considerable debate concerning the quantum of corroboration necessary to substantiate the existence of the crime charged. It is agreed that the corroborative evidence does not have to prove the offense beyond a reasonable doubt or even by a preponderance, as long as there is

substantial independent evidence that the offense has been committed, and the evidence as a whole proves beyond a reasonable doubt that defendant is guilty. (Citations). But cf. *United States v. Fenwick,* 177 F. 2d 488. In addition to differing views on the substantiality of specific independent evidence, the debate has centered largely about two questions: (1) whether corroboration is necessary for all elements of the offense established by admissions alone (citations), and (2) whether it is sufficient if the corroboration merely fortifies the truth of the confession, without independently establishing the crime charged, compare (citations). We answer both in the affirmative. All elements of the offense must be established by independent evidence or corroborated admissions, but one available mode of corroboration is for the independent evidence to bolster the confession itself and thereby prove the offense 'through' the statements of the accused."

The record here discloses that the trial court throughout the trial and in his instructions to the jury carefully protected appellant's constitutional rights, especially his right to the presumption of innocence until the evidence of the government established his guilt beyond a reasonable doubt.

We shall first consider the contention that the government's case was founded upon uncorroborated admissions of the appellant. This contention refers to (1) the opening net worth statement for 1936, and (2) the net worth and income for the taxable years 1945, 1946 and 1947. Both contentions are without merit.

The opening or beginning net worth used by the government in its computations was established at $18,578.58 as of the end of the year 1936. This was based upon an affidavit executed by appellant on July 2, 1937, in which he listed his assets as of December 31, 1936. The affidavit was filed by

appellant in connection with his defense in a claim then pending against him for unpaid taxes. It is corroborated by the investigations of the revenue agents made soon after it was filed and again after the initiation of the present case. Their testimony fully and adequately corroborates the admissions made in the affidavit.

It is next contended that appellant's admissions in exhibits 70 and 71 were not adequately corroborated. These exhibits were connected with the investigations made by the government of appellant's income and his tax returns for the years involved. Agent George H. McKusick of the Bureau of Internal Revenue was conducting the investigations. In December, 1950, McKusick requested appellant to come to a conference for the purpose of substantiating his tax returns for the years 1945, 1946 and 1947. Appellant refused to come to such a conference but instead sent his attorney, Mr. Joseph A. O'Gordon, with a power of attorney. It developed that Mr. O'Gordon, although he had a power of attorney, could not answer any questions relating to the income or business of the appellant. McKusick then submitted to him a list of questions (exhibt 70) concerning appellant's business transactions which had been discovered in the investigations and requested him to obtain the answers of appellant. In the following February Mr. O'Gordon returned the questions with the answers of appellant on a separate sheet of paper (exhibit 71). Mr. O'Gordon testified at the trial and identified the exhibits.

The admissions in these exhibits amply support the verdict of the jury. And the admissions are amply corroborated by the evidence. They are corroborated in part by appellant's income tax returns, in part by his wife's returns and by bank accounts in her name but which consisted of deposits

of appellant's money. These admissions are corroborated by the undisputed evidence that most of the items were received by appellant from the sale of property or corporate stocks and deposited in his wife's bank account but not reported by her as taxable income. Properties were sold which were owned jointly by appellant and some other person. The other person reported his share of the proceeds of such sales but appellant did not include any part of his share in his tax returns. Without detailing here all of such transactions shown in the record we are satisfied that all of the admissions referred to are amply corroborated. The requirements of the Supreme Court in the *Smith* case, *supra,* are fully met, wherein the Court say (page 156):

"All elements of the offense must be established by independent evidence or corroborated admissions, but one available mode of corroboration is for the independent evidence to bolster the confession itself and thereby prove the offense 'through' the statements of the accused." Citing *Parker v. State,* 228 Ind. 1, 88 N. E. 2d 556.

This statement of the Court applies with particular emphasis to appellant's admissions of his living expenses for the taxable years involved. Revenue Agents McKusick and Kleven conducted an investigation of the living expenses of appellant for the three years involved and submitted their findings to appellant's attorney, O'Gordon, and his accountant, Weinstock, both of whom had filed powers of attorney from appellant with the agents. The estimates were submitted by them to appellant and they reported that he would "be happy to use the figures." Thus the independent evidence of O'Gordon and Weinstock "bolstered the confession itself and thereby proved" the amount determined "'through' the statements of the accused."

Appellant's second contention is that the government failed to investigate leads available to it or independently to verify the uncorroborated admissions of the defendant. This contention is without merit and is not applicable to the situation presented here. The admissions referred to are to be found in exhibits 33, 70 and 71. In this case the investigation by the revenue agents preceded the admissions of appellant. The answers and statements of appellant in these exhibits referred only to matters which had been previously investigated by the government. The answers to the questions demonstrated the guilt of appellant and they were corroborated in each instance.

The word "leads" is explained in the *Holland* case (348 U. S. 121, 135, 136) as follows:

"When the Government rests its case solely on the approximations and circumstantial inferences of a net worth computation, the cogency of its proof depends upon its effective negation of reasonable explanations by the taxpayer inconsistent with guilt. Such refutation might fail when the Government does not track down relevant leads furnished by the taxpayer—leads reasonably susceptible of being checked, which, if true, would establish the taxpayer's innocence. When the Government fails to show an investigation into the validity of such leads, the trial judge may consider them as true and the Government's case insufficient to go to the jury."

Appellant's argument overlooks the fact that the admissions in exhibits 33, 70 and 71 were his own statements in answer to questions of the revenue agents and that they were all connected with the investigations made by the revenue agents. Each admission had already been investigated. There was no necessity for further following up the admissions with further investigation. The corroboration of these admissions was sufficient to meet the suggestions and require-

ments of the *Holland* case. If any of the facts admitted in any way proved the innocence of appellant the evidence warranted the submission of that issue to the jury.

Finally it is contended that the court erred in failing to give certain requested instructions.

In summary the contention is that the court failed (1) to give defendant's requested instruction No. 11, and (2) to give any instruction relative to the net worth theory of proof on tax evasion.

Requested instruction No. 11 reads:

"In this case the government relies on a claimed increase in the defendant's net worth in the years 1945, 1946 and 1947 to prove claimed unreported income during said years. The government's case must fail if the claimed net worth of the defendant at the starting point of the periods in question is not correct and has not been established beyond a reasonable doubt. A correct starting point must include all of the defendant's assets at that time as well as all of his liabilities. It is also incumbent upon the government to exclude any reasonable probability that the increase in net worth is attributable to capital assets or accumulations by the taxpayer in periods prior to the starting point of the net worth period in question.

"In addition to establishing a correct starting point, it is incumbent upon the government to prove beyond a reasonable doubt the defendant's net worth for each year from the starting point up to and including the year 1947."

We have carefully reviewed all fourteen instructions requested by counsel for appellant as well as all the instructions given by the court and we are convinced there is no merit in appellant's contentions. The Supreme Court in the *Holland* and *Smith* cases, *supra*, recognized that the net worth method of proof consists of circumstantial evidence;

and the trial court gave defendant's requested instruction No. 1 on circumstantial evidence in the exact language of the request.

The instructions given by the court protected every right of the defendant and presented and submitted his claims fairly to the jury. Counsel criticise the instructions because they do not use the term "net worth method." There was no dispute, however, in regard to the character of the net worth method. It was and is a circumstantial evidence method of proof, and the instructions given covered every element of the contentions of the parties and the testimony of the witnesses. The testimony introduced and the arguments of counsel, all of which are set out in the record, made clear the meaning of the term, so that a technical definition was unnecessary. *Wishart v. United States,* 8 Cir., 29 F. 2nd 103, 105; *Shreve v. United States,* 9 Cir., 103 F. 2d 796, 812, cert. den., 308 U. S. 570. No prejudice is shown here resulting from the absence of a definition of the term "net worth." See 3 Am. Jur., 639. There was no issue as to the meaning of the term "net worth", and no prejudice is shown for failure to define the term. See *Deacon v. United States,* 1 Cir., 124 F. 2d 352.

Since the submission of this case to the court on reargument as above set out on March 9, 1955, the appellant has called the attention of the court to two cases involving the question of tax evasion from other circuits.

On April 11, 1955, the United States Court of Appeals for the Ninth Circuit filed its opinion in the case of *Bloch v. United States,* in which it reversed and remanded the case for a new trial on the sole ground that the trial court's instruction on willfulness was erroneous. In this connection it is interesting to note that appellant made no objection

to the instruction as given, but only objected to the failure of the Court to give his requested instruction. However, the Ninth Circuit followed Rule 52(b) of the Federal Rules of Criminal Procedure and applied by the Supreme Court in *United States v. Atkinson,* 297 U. S. 157, as follows:

"In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity, or public reputation of judicial proceedings."

The trial court's charge there on the subject of willfulness which the appellate court found to be erroneous is as follows:

". . . It [willfulness] includes several states of mind, any one of which may be the willfulness to make up the crime.

"Willfulness includes doing an act with a bad purpose. It includes doing an act without a justifiable excuse. It includes doing an act without ground for believing that the act is lawful. It also includes doing an act with a careless disregard for whether or not one has the right so to act."

It may be noted that the court stated that the trial court's instruction on presumption, which is similar to that given by the trial court here, was erroneous, but the court reversed on the count covering the subject of willfulness.

While appellant apparently feels that the error in the trial court's instructions in the *Bloch* case place the case here on all fours with that case, he fails to consider, in spite of the similarity of the instruction as to presumption in both cases, the plain and clear instructions submitted to the jury by the trial court here as to the question of

intent, so here the instructions of the trial court taken as a whole place the case completely outside of the error the appellate court found in the *Bloch* case. On the subject of intent the trial court in this case stated:

"The element of intent enters into the offenses charged in the indictment and is one of the questions for you to consider and decide. That is, whether the defendant willfully and knowingly attempted to defeat and evade a portion of his income tax due and owing by him to the United States of America for the calendar years 1945, 1946 and 1947."

Appellant also overlooks two other cases from the Ninth Circuit, in both of which the appeals were based on erroneous instructions.

In one of them, *Bateman v. United States*, 9 Cir., 212 F. 2d 61, decided on April 15, 1954, before the Supreme Court had ruled on the *Holland* and companion cases (348 U. S.), the court said (page 70):

"As often occurs counsel has singled out one instruction in claiming error without regard to the instructions considered as a whole. The instructions on intent, given by the Court, correctly stated the law, were plain and understandable, and left no room for doubt in the minds of the jurors . . .

"It is apparent that the jury was fully instructed that if appellants acted in good faith they should be acquitted."

So here, the trial court instructed the jury: ". . . if you are not satisfied of the defendant's guilt beyond a reasonable doubt, you should find him not guilty." And certainly, the trial court's instructions on intent "correctly stated the law, were plain and understandable, and left no room for doubt in the minds of the jurors."

The second case from the Ninth Circuit to which we refer is that of *Legatos v. United States* decided on May 12, 1955.

This decision was entered after the decision in the *Bloch* case, *supra,* and in that opinion the court refers to both the *Bateman* and *Bloch* cases as follows:

"It is our conclusion that, considered as a whole the Court's instructions on intent and willfulness clearly and correctly stated the law and were not such as to mislead the jury. We conclude, therefore, that the present case is governed by *Bateman v. United States, supra,* and is distinguishable from *Wardlaw v. United States, supra,* and *Bloch v. United States, supra,* where the effect of the court's instructions considered as a whole was not discussed."

A careful review of these three opinions of the Ninth Circuit convinces us that the case here has more similarity to the *Legatos* and *Bateman* cases than to the *Bloch* case. And the statement in the *Legatos* case, *supra,* "that, considered as a whole the Court's instructions on intent and willfulness clearly and correctly stated the law and were not such as to mislead the jury," applies here.

The case of *Steele v. United States* was decided by the Court of Appeals for the Fifth Circuit on May 13, 1955, and the court reversed the decision of the trial court, stating that the most prejudicial of the errors dealt with two government exhibits, one of which purported to be a computation of Steele's income on a net worth basis, and the other exhibit a computation of such income on the expenditures—available funds basis. The court upheld appellant's contention that there were omissions, interpretations and discrepancies between the record and the exhibits and a considerable portion of the testimony of some of the witnesses. Here the exhibits conformed to the evidence submitted by the government.

In the *Steele* case after the jury had retired the United States Attorney requested that the exhibits be sent to the jury room, which was done over the objections of appellant. Nothing in the record here indicates what happened to exhibits 33, 70, and 71 after the jury retired. The decision in the *Steele* case is not applicable here. The trial court here exercised great care and caution in reference to the testimony of the government witness who prepared the exhibits and in receiving the exhibits themselves, and in his instructions to the jury that intent to defeat and evade is an essential to the crime charged and he guarded against the possibility that the jury would assume that the figures in the exhibits once established confirmed the guilt of appellant.

Since the resubmission of this case on March 9, 1955, we have reviewed the original record and briefs, the petition for rehearing, the records and briefs submitted at the time of the reargument, and the cases called to our attention since then by the able counsel on both sides. We are still convinced that appellant had a fair trial and that there is no reversible error. Accordingly the judgment of the trial court is

Affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 14,648

September Term, 1954
Tuesday, June 28, 1955

JUDGMENT IN CAUSE NO. 14,648

Thomas W. Banks, Appellant, vs. United States of America, Appellee.	Appeal from the United States District Court for the District of Minnesota.

This cause came on to be heard on the record from the United States District Court for the District of Minnesota, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby, affirmed.

And it is further Ordered by this Court that the defendant in the said District Court, Thomas W. Banks, do surrender himself to the custody of the United States Marshal for the District of Minnesota, if not now in custody, in execution of the judgment and sentence imposed upon him, within thirty days from and after the date of the filing of the mandate of this Court in the said District Court.

June 28, 1955.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 14,648

September Term, 1954
Monday, July 25, 1955

ORDER DENYING PETITION OF APPELLANT FOR REHEARING, ETC.

Thomas W. Banks,
Appellant,
vs.
United States of America,
Appellee.

Appeal from the United States District Court for the District of Minnesota.

Petition of the appellant for a rehearing in this case and request for consideration by the Court en banc was submitted to the Court having heard this case on the merits, and after due consideration the request that the petition be considered by the Court en banc is denied. The petition for rehearing is also denied.

July 25, 1955.

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 337

THOMAS W. BANKS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The original opinion of the Court of Appeals affirming the judgment of the District Court is reported at 204 F. 2d 666. The *per curiam* order of this Court vacating the judgment and remanding the cause to the Court of Appeals for consideration in light of the net worth cases decided December 6, 1954,[1] is reported at 348 U. S. 905-906. The

[1] *Holland* v. *United States*, 348 U.S. 121; *Friedberg* v. *United States*, 348 U.S. 142; *Smith* v. *United States*, 348 U.S. 147; *United States* v. *Calderon*, 348 U.S. 160.

opinion of the Court of Appeals reaffirming the judgment of the District Court (Pet. 21-33) is reported at 223 F. 2d 884.

JURISDICTION

The judgment of the Court of Appeals was entered June 28, 1955 (Pet. 34), and the petition for rehearing was denied July 25, 1955 (Pet. 35). The petition for a writ of certiorari was filed on August 22, 1955. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

QUESTIONS PRESENTED

1. Whether there was sufficient evidence to establish the petitioner's starting point net worth.

2. Whether the indictment is invalid because the only witness who appeared before the grand jury was a Government revenue agent.

3. Whether the trial court erred in admitting into evidence exhibits summarizing the Government's findings as to petitioner's net worth and claimed tax deficiencies, and in permitting the jury to have them during deliberations.

4. Whether the trial court committed reversible errors of omission or commission in instructing the jury.

STATUTE INVOLVED

Internal Revenue Code of 1939:

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person

required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U. S. C. 1952 ed., Sec. 145.)

STATEMENT

Petitioner's conviction, on the net worth theory, in the United States District Court for the District of Minnesota for knowingly attempting to evade his income taxes for the years 1945, 1946, and 1947, was affirmed by the Court of Appeals for the Eighth Circuit. On January 10, 1955, this Court vacated the judgment of the Court of Appeals and remanded the case to that Court for consideration in the light of this Court's decisions in the net worth cases. 348 U. S. 905-906. On the remand, the Court of Appeals reaffirmed the conviction.

The Government's prior brief in opposition to the first petition filed in this case (No. 13, October Term, 1954) contains (pp. 3-11) a detailed statement of the facts surrounding the conviction, to which this Court is respectfully referred. In view,

however, of petitioner's abandonment of some of the questions presented in his first petition for a writ of certiorari and his raising in the present petition of contentions not presented in the first (particularly those relating to the adequacy of the net worth starting-point evidence), we believe it to be desirable to state the following additional facts:

On July 2, 1937, petitioner submitted to the Government, in connection with an offer in compromise of alcohol taxes, an affidavit (Gov. Ex. 33; R. 337-340) "for the purpose of disclosing * * * [his] financial condition" (R. 339). This affidavit listed assets totalling $27,779.15 and liabilities totalling $14,500, and concluded that "it is my opinion that I am actually insolvent at the present time" and "the most I have ever been worth was $30,000 * * * about 1920." (R. 339.) No undeposited cash was listed. The starting point of the Goverment's computations was December 31, 1936, at which time petitioner's net worth, based upon an exhaustive investigation by the Government (R. 191, 327, 341, 354, 408, 425-426, 433), was determined to be $18,578.58 (Govt. Ex. 224; R. 511), a figure which agrees substantially with the admitted net worth as of July 2, 1937. Although the agents made a "diligent search" for evidence of cash on hand as of the end of 1936 they found none (R. 433), nor did petitioner claim any when given an opportunity to do so (Govt. Exs. 70, 71; R. 568-569). There was evidence that he was forced to borrow $7,800 in September, 1937, to pay taxes

in that year. (R. 434-435.) The investigation was also directed at the possibility that petitioner might have received substantial sums by gift or inheritance between 1937 and 1947, but no evidence of such receipts was found. (R. 330-331.)

While petitioner's net worth increases and expenditures tended to show net income for the years 1937-1944 (*i. e.*, the years between the starting point and the first prosecution year) of $278,764.87, the net income reported on his returns for those years totalled only $70,158.35. (Govt. Exs. 1-8, 224; R. 520-521.) It was then shown that petitioner's net income and tax liability for the prosecution years as claimed by the Government (based on the net worth-expenditures computations) compared with the reported amounts as follows (Govt. Exs. 224, 226):

	Net Income		Income Tax	
Year	Reported	Claimed by Government	Reported	Claimed by Government
1945.....	$20,170.11	$ 43,690.11	$ 7,675.27	$22,719.33
1946.....	27,100.99	36,799.97	10,556.98	16,386.39
1947.....	20,609.29	41,453.07	6,955.14	19,022.69
Totals.....	$67,880.39	$121,943.15	$25,187.39	$58,128.41

Although the major source of petitioner's reported income was "wagering" (Govt. Exs. 9-11), the agents were furnished no books or records relating to that activity (R. 184, 192, 198, 265-266). There was considerable independent evidence tending to show petitioner's wilfulness, *e. g.*, the holding of assets in the name of nominees (R. 412-413), and the handling of transactions in such a manner

as to make them extremely difficult to trace (R. 217, 244-246, 253, 265-267, 292-293, 322-328, 369-372, 433-435). Petitioner adduced no evidence to rebut the Government's case. The jury found him guilty on all three counts of the indictment.

ARGUMENT

1. Petitioner contends (Pet. 8-11) that the evidence of his net worth at the starting point was insufficient to present an issue for jury determination because (a) he was given credit for no undeposited cash although he had substantial dealings in cash, and (b) the admissions contained in his affidavit as to his net worth in 1937 were uncorroborated. Neither contention was raised in the first petition for certiorari [2] and neither has merit.

(a) Petitioner asserts a conflict between the instant case and *United States* v. *Costello*, 221 F.2d 668 (C. A. 2d) (No. 72, October Term, 1955), pointing out that there the Court of Appeals reversed defendant's conviction on the first count because it was not satisfied that the Government's determination that he had no opening cash on hand was correct. But in that case, as the court pointed out (p. 673), "in the past he had always kept such reserves in large amounts", which fact was indicated not only by defense testimony at the trial but by the very starting point evidence relied upon by the Government, an oral statement given to Treasury agents under oath by the defendant in 1937. (See

[2] The contention that the 1937 affidavit was uncorroborated was, however, raised in a supplement to the petition, filed sixteen months after the petition. (No. 13, October Term, 1954.)

Brief for the United States in Opposition to certiorari in *Costello* v. *United States,* No. 72, October Term, 1955, pp. 5, 7.) In the instant case there is the converse situation, for not only was there no claim of cash on hand advanced before or during the trial but the evidence affirmatively showed that petitioner had none at the starting point (*supra,* pp. 4-5). Under these circumstances any assumption that the net worth increase for a particular year or years might be accounted for by opening cash on hand would be completely unrealistic and speculative.

(b) The argument (Pet. 10-11) that the 1937 affidavit which constituted the starting point was not corroborated is equally unsound. In the first place, no corroboration was required for the document was plainly an admission *ante litem motam. Warszower* v. *United States,* 312 U.S. 342, 347-348; Cf. *Smith* v. *United States,* 348 U. S. 147, 152-155. Nevertheless, the admissions in the affidavit were directly and thoroughly corroborated by (1) a net worth investigation made by Treasury agents prior to the submission of the affidavit (R. 410, 533-534), and (2) the subsequent exhaustive investigation into petitioner's net worth and his financial dealings during the entire period 1937-1947 (*supra,* pp. 4-6), all of which pointed unerringly to the truth of the admissions. Indirect corroboration, *i.e.,* corroboration going to the *corpus delicti,* is found in petitioner's consistent net worth increases and expenditures far in excess of reported income (Govt. Ex. 224; R. 465-521) during years when he

was receiving unrecorded amounts of income (Govt. Exs. 9-11; R. 184, 192, 198, 265-266). *United States* v. *Calderon*, 348 U. S. 160, 168; *Smith* v. *United States*, 348 U. S. 147, 158-159.

2. Petitioner renews his contentions with respect to the validity of the indictment. (Pet. 11-13.) The lack of substance in these contentions was sufficiently demonstrated in our original brief in opposition in this case (No. 13, October Term, 1954, pp. 11-14), to which the Court is respectfully referred.

3. Petitioner contends (Pet. 16-19) that the trial court erred in admitting into evidence the Government's summaries of petitioner's net worth, expenditures, and tax deficiencies as claimed by the Government, and in permitting the jury to use them during its deliberations without "guarding instructions." (The portion of this contention relating to the alleged failure to instruct is treated under our Question 4 (*infra*, pp. 10-11). These contentions are without merit, for the summaries (Govt. Exs. 224 and 226)[3] were based entirely upon documents already in evidence and oral testimony in the record (R. 453-527). It is well settled that the use of such summaries is proper where the record presents a complicated set of facts. In *United States* v. *Kelley*, 105 F. 2d 912, 918 (C. A. 2d), the court said:

> This kind of evidence when based upon documents themselves competent and accessible,

[3] Exhibits 225 and 227 were enlargements of Exhibits 224 and 226, respectively.

is always admissible; a jury without such guidance would be totally unable to cope with complicated accounts.

Accord: *United States* v. *Schenck,* 126 F. 2d 702, 708 (C. A. 2d); *Bell* v. *United States,* 185 F. 2d 302, 306-308 (C. A. 4th), certiorari denied, 340 U. S. 930; *Hanson* v. *United States,* 186 F. 2d 61, 67 (C. A. 8th); *Bateman* v. *United States,* 212 F. 2d 61, 68 (C. A. 9th); *Graves* v. *United States,* 191 F. 2d 579, 584 (C.A. 10th). In *Holland* v. *United States,* 348 U. S. 121, 127-128, this Court implicitly sanctioned the practice, though warning that it might in some circumstances be dangerous should the summaries be sent to the jury without guarding instructions. The case of *Steele* v. *United States,* 222 F. 2d 628 (C. A. 5th), relied upon by petitioner (Pet. 18), is distinguishable on the facts. The reversal there rested principally upon the court's conclusion that the peculiar circumstances under which two charts were sent to the jury room after deliberations had begun invested them with a special "air of credibility" in the jury's eyes (p. 630).[4]

The danger envisaged by petitioner, that the

[4] The record does not support petitioner's assertion (Pet. 18) that "wall size replicas" of Exhibits 224 and 226 were "kept before the jury throughout the trial and during its deliberation on the verdict." The enlargements (size not shown) were brought into the courtroom on an easel near the end of the trial (R. 455, 457-458, 461) and the record does not show that they were ever taken to the jury room, nor that petitioner objected to the jury's taking with them even the unenlarged version.

jury might assume that the Government's charts were automatically to be accepted as correct, did not exist in this case. Any possible misconception that might have arisen from use of the term "Unreported Income" in Exhibit 224 was certainly erased by Exhibit 226, which set forth the reported income and taxes together with the "Taxable Net Income as Claimed by Government", the "Federal Income Taxes Gov't Claimed Should Have Been Reported" and the "Federal Income Taxes Gov't Alleges Should Have Been But Were Not Reported." The very nature of the charts plus the careful instructions of the court (*infra*, pp. 10-13) assured that the jury could not possibly be misled into thinking that they were bound to accept the Government's computations as correct.

4. Petitioner alleges three reversible errors in the court's instructions to the jury in that (a) no "guarding instruction" was given as to the use to be made of the Government's summaries (Pet. 17-18); (b) no instruction was given summarizing the net worth method and the "assumptions upon which it rests" (Pet. 13-14); and (c) an erroneous instruction was given on presumptive intent. The contentions are without substance.

(a) Although petitioner did not request any "guarding instruction" as to the jury's use of the Government's summaries (Exs. 224, 226) the court made it clear that it was for the jury to determine whether they were correct (R. 618):

> Hypothetical questions were put to a revenue agent on which he computed the tax which

the Government claims should have been paid for each of the three years involved.

You are instructed to determine whether the individual tax liabilities for the years here involved are correct as the same is set forth in the computations and charts made by the Government's expert witnesses in response to the hypothetical questions which assume the truth of the Government's evidence.

Moreover, as we have shown (*supra*, p. 10), the language of Exhibit 226 made it crystal clear that the figures represented only what the Government was alleging and were in no way binding upon the jury.

(b) It is true that the court did not comply literally with the dictum which appeared two and a half years later in *Holland* v. *United States*, 348 U. S. 121, 129, that the instructions should include "a summary of the nature of the net worth method, the assumptions on which it rests, and the inferences available both for and against the accused." But when the entire charge (R. 610-623, 627) is read, it is clear that the court below was fully justified in concluding (Pet. 29) that every right of the defendant was protected; that there was no dispute as to the nature of the net worth method, which was clarified by the testimony and the arguments of counsel (R. 167-168, 197-198, 407-409, 511-515, 585-586); and that the petitioner has shown no prejudice resulting from the absence of a definition of the term "net worth." Petitioner's Requested In-

struction No. 11 (R. 582), relating to the starting point, was unnecessary because the Government's expert witnesses and counsel had plainly stated that if there was substantial error in the determination of starting point net worth there would be no basis for conviction (R. 194, 391, 408-409, 532-533). Moreover, it was clearly erroneous in stating that "it is incumbent upon the government to prove beyond a reasonable doubt the defendant's net worth for each year from the starting point up to and including the year 1947." (R. 582.) The Government had not reconstructed petitioner's net worth for every intervening year (Govt. Ex. 224) and was not required to do so. *United States* v. *Skidmore,* 123 F. 2d 604, 608-609 (C.A. 7th), certiorari denied, 315 U.S. 800; *United States* v. *Potson,* 171 F. 2d 495, 498 (C.A. 7th). And see *Friedberg* v. *United States,* 348 U.S. 142.

(c) Finally, petitioner contends (Pet. 14-16) that the trial court committed reversible error in giving the following instruction (R. 616-617):

> The attempt must be wilful, that is, intentionally done with the intent that the Government should be defrauded of the income tax due from the defendant.
>
> The presumption is that a person intends the natural consequence of his acts and the natural presumption would be if a person consciously, knowingly, or intentionally did not set up his income and thereby the Government was cheated or defrauded of the tax, that he intended to evade and defeat the tax.

No objection to this part of the instruction was made at the trial and the point was first raised by petitioner in a letter to the Court of Appeals dated May 23, 1955, three years after the trial. When the quoted sentences are read in the context of the entire charge, as they must be (*Boyd* v. *United States,* 271 U. S. 104, 107), it is clear that the jury was properly instructed that petitioner was presumed to be innocent and that the burden was squarely on the Government to establish beyond a reasonable doubt a knowing and wilful attempt to evade. (R. 612-621, 627.) The case of *Morissette* v. *United States,* 342 U. S. 246, presented an entirely different factual situation wherein the trial judge instructed the jury that wrongful intent was conclusively presumed from the mere act, and refused to allow the defense to show or to argue that the act was done innocently. The case of *Bloch* v. *United States,* 221 F. 2d 786 (C. A. 9th), relied upon by petitioner to establish a conflict, is distinguishable on two grounds (1) the other instructions on wilfulness were clearly prejudicial, for they told the jury in effect that evidence of mere carelessness was sufficient to satisfy the requirement of wilfulness (Pet. 30); and (2) wilfulness was of the essence there, for Bloch's defense was that he had not acted wilfully. In the instant case the defense offered no evidence and the instruction as a whole obviated any confusion.[5] (R. 612-621.)

---

[5] The presence of the words "consciously, knowingly, or intentionally" (R. 617) would seem to foreclose the jury from indulging any presumption against petitioner.

As the Court of Appeals for the Ninth Circuit recently recognized in denying a petition for rehearing in the *Bloch* case (223 F. 2d 297, 298), each case presents a separate problem as to whether such an instruction is prejudicially erroneous. See *Legatos* v. *United States,* 222 F. 2d 678, 685-688 (C. A. 9th); *Bateman* v. *United States,* 212 F. 2d 61, 69-70 (C.A. 9th). In the instant case, the Court of Appeals was plainly correct in concluding (Pet. 31) that the instructions on intent "correctly stated the law, were plain and understandable, and left no room for doubt in the minds of the jurors."

CONCLUSION

There is no conflict of decisions, and the petition for a writ of certiorari presents no other questions which warrant further review by this Court. The petition should, therefore, be denied.

Respectfully submitted,

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HAROLD B. WILLE

No. 337

IN THE

Supreme Court of the United States

October Term, 1955

THOMAS W. BANKS, Petitioner

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITIONER'S BRIEF IN ANSWER TO BRIEF OF THE UNITED STATES IN OPPOSITION

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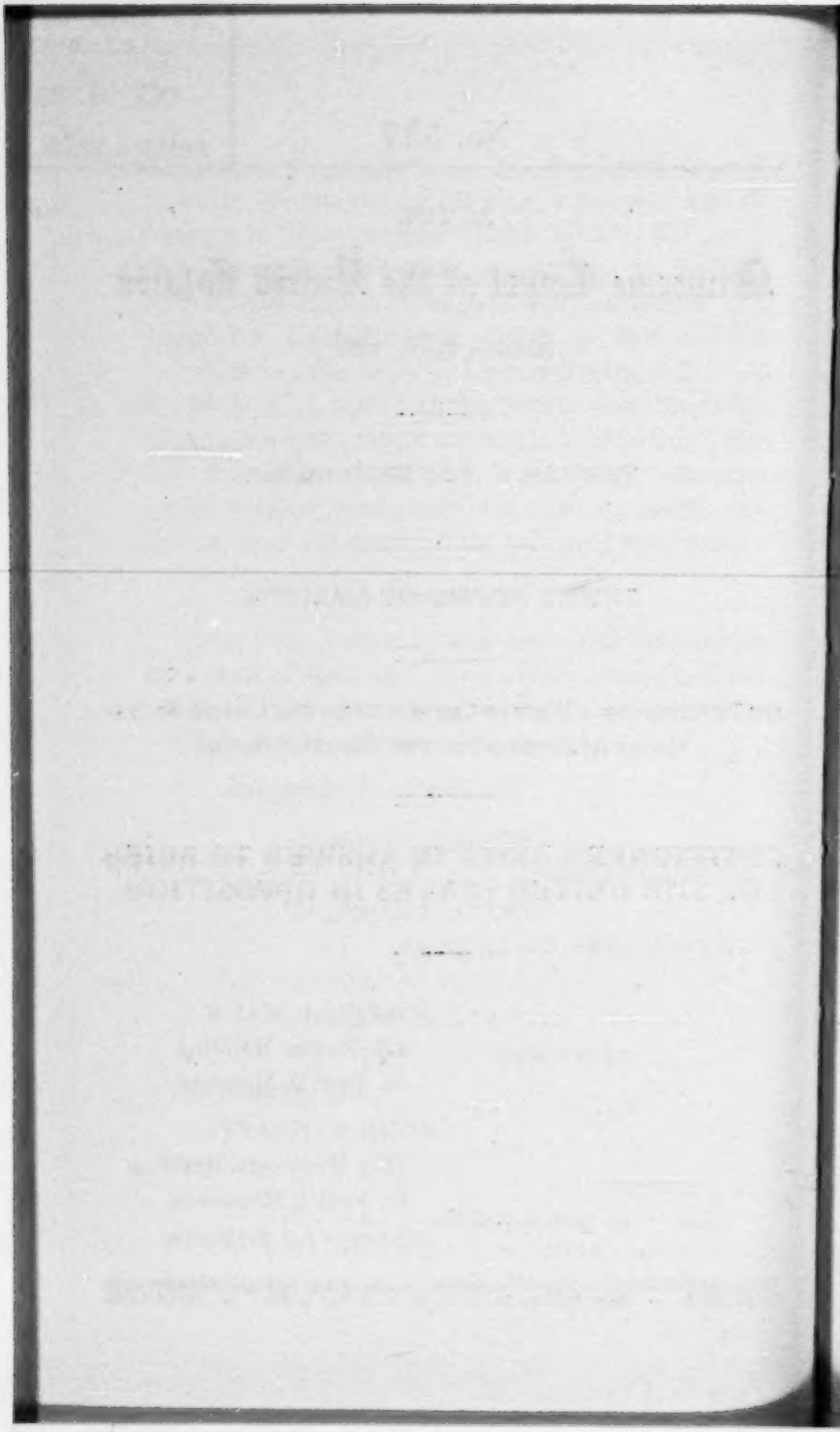

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ARGUMENT

I.

In his petition for certiorari, defendant Banks alleged as error that the United States did not allow him even one cent of cash in the opening net worth statement, and cited *United States v. Costello,* 221 F. 2d 668 (C.A. 2d) (1955) in support

of his position. On page 7 of its brief in opposition, the United States, in its endeavor to distinguish the *Costello* case asserts:

> "In the instant case there is the converse situation, for not only was there no claim of cash on hand advanced before or during the trial but the evidence affirmatively showed that petitioner had none at the starting point."

That assertion of the Government is amazing in view of the fact that it is clear that the Government knew that defendant Banks did have cash on hand. For example, the Honorable Judge Bell, the trial judge in this proceeding, in an opinion refusing to modify defendant Banks' sentence, stated:

> "During the greater part of his active life the defendant has been engaged in business on an extensive scale and has owned property of large value. The greater part of his business has been done with the use of money * * *". (Supp. R. 42)

II.

On page 8 of its brief, the Government urges that the wall sized replicas of summaries of defendant Banks' alleged increase in net worth "were based entirely upon documents already in evidence and oral testimony in the record."

The fact is that one of the exhibits (Ex. 224) was completely prepared more than a year before the trial, with only minor modifications (R. 456).

The Government further urges as to these exhibits (Government's Brief in Opposition p. 9) that "the record does not show that they were ever taken to the jury room." Such an assertion is nonsense. If they were not taken to the jury room, obviously error occurred because all of the exhibits should be before the jury in its deliberations. If they were

taken into the jury room, error occurred because no guarding instructions whatsoever were given respecting their use by the jury.

In its brief before this Court (p. 10) the Government states that "the careful instructions of the court" made it impossible for the jury to be misled. The fact is that no instructions of any kind were given relative to these charts. In his instructions, Judge Bell stated to the jury:

> "Indeed, I have undertaken to avoid comment on the evidence and on the facts as I may view them." (R. 622)

How then can the Government conscientiously urge to this Court that guarded and careful instructions were given?

III.

In its brief before this Court (p. 11) the Government endeavors to pass over the admitted fact that no instructions of any kind whatsoever were given with respect to the net worth method, by the statement that the trial "court did not comply literally" with the rules enunciated in *Holland v. United States*, 348 U. S. 121. The real truth is that the trial court did not comply in any respect or sense at all. It refused a requested instruction on the net worth method and gave none of any kind of its own. As a matter of fact, the word "net worth" was not used throughout the instruction.

The Government asserts further that "there was no dispute as to the nature of the net worth method." Nothing could be further from the truth. Every objection defendant made throughout the long trial went to the very foundation of that method.

The Government further urges that in any event "defendant Banks has shown no prejudice resulting from the absence

of a definition of the term 'net worth'." (p. 11) The fact remains, however, that defendant was convicted. What greater evidence could there possibly be of prejudice? Failure to follow the rules enunciated by this Court even carried over to the detriment of the defendant in his appeal to the Court of Appeals for the Eighth Circuit, for in its opinion for rehearing, that court stated:

> "Defendant failed to report income from properties held jointly by him and others."

Such obviously was and is not the fact for the entire case of the Government was bottomed on the net worth theory solely and exclusively. As the chief prosecuting attorney for the Government stated during the course of the trial, the opening net worth statement "was the foundation stone for this case." (R. 194)

CONCLUSION

It is respectfully submitted that in the interests of justice the petition for certiorari should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 337

THOMAS W. BANKS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

MOTION FOR LEAVE TO FILE SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI AND SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI

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IN THE

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OCTOBER TERM, 1955

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THOMAS W. BANKS,

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UNITED STATES OF AMERICA,

Respondent.

MOTION FOR LEAVE TO FILE SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI

The petitioner, Thomas W. Banks, by his attorneys, Joseph A. Maun and John W. Graff, moves the Court for leave to file the attached Supplement to Petition for Writ of Certiorari, and in support of such motion states:

Since the filing of the petition for the writ in this cause, a tax evasion prosecution, important developments have taken place in another alleged tax evasion case wherein a petition has been filed with this Court. That case is *Frank Costello v. United States of America,* No. 72. It appears

that the action of this Court in that case may have a far-reaching bearing on the action which should be taken by this Court on the petition in the instant case.

As an aid to the Court in the analysis of this case to determine the impact on it of the above case, petitioner should be granted leave to file the attached supplement to his petition for writ of certiorari.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

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THOMAS W. BANKS,

Petitioner,

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UNITED STATES OF AMERICA,

Respondent.

SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI

I.

This term an order was entered by this Court granting certiorari in the case of *Frank Costello v. United States of America,* No. 72. That case and the instant case both involve questions relating to the proceedings had before the grand jury in which the indictment was returned. It will be noted that the Government's brief in opposition to the petition for certiorari in the *Costello* case (Gov. Br. pp. 8-11) relied heavily on the *Banks* case. Such great reliance was had by the Government in its brief in opposition, that the attorney for Costello deemed it necessary to file a reply brief outlining their views as to the decision of the Court of Appeals for the

Eighth Circuit in this, the *Banks* case (Pet. Reply Br. pp. 3-4). After the filing of those briefs, this Court granted the petition for certiorari but limited it to the question whether a defendant is required to stand trial and a conviction can be sustained where only hearsay evidence was presented to the grand jury which returned the indictment. In this, the *Banks* case, the third point (Pet. p. 3) of the petition raises the question of the validity of an indictment where there was no adequate legally admissible evidence produced before the grand jury which returned the indictment.

Principles of criminal procedure of great public import concerning indictments undoubtedly will be enunciated by this Court in the *Costello* case. This decision could very well affect the decision in the *Banks* case. Under these circumstances, it is respectfully urged that the petition in the *Banks* case should be considered in the light of the petition which was granted in the *Costello* case. These considerations compel us to respectfully suggest that the petition in the *Banks* case be granted forthwith so that it may be considered at the same time as the *Costello* case or that decision on the petition in the *Banks* case be withheld until after the announcement of the decision in the *Costello* case.

CONCLUSION

For the reasons set forth in the original petition and for the additional reasons set forth herein, the petition for a writ of certiorari should be granted. In lieu thereof, should the Court deem it more appropriate, the decision on the petition for a writ of certiorari should be withheld pending announcement of the decision in the *Costello* case.

Respectfully submitted,

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